

**Scientific Ecology Group, Inc. and Oil, Chemical,
and Atomic Workers International Union,
AFL-CIO. Case 10-CA-27441**

July 26, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND
TRUESDALE

On September 19, 1994, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

The judge found, *inter alia*, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Donnie R. Davis in retaliation for union organizing. In its exceptions, the Respondent contends that Davis was discharged for sleeping on the job and using obscene language in his disciplinary hearing. The Respondent also argues that there is no evidence of any animus harbored by the Respondent toward Davis for his union activities. In this regard, the Respondent contends that the judge erred in concluding that leadperson Self was its agent when on March 7, 1994, he discovered Davis dozing and told other employees to leave Davis alone because "we are going to get him." It further asserts that the judge erred in basing a finding of animus on Plant Manager Walsh's statement to Davis that, "If you feel like a union can do a better job than I can, then you're crazy."

We agree with the judge that the General Counsel established a *prima facie* case of discrimination. We find it unnecessary however, to pass on the judge's findings that Self was acting as the Respondent's statutory agent on March 7 or that Plant Manager Walsh's above-mentioned statement is evidence of animus. Thus, the record contains ample evidence of animus, including the Respondent's March 4 meeting with employees in which Walsh stated that he was disappointed about the organizing effort and that someone in the room was responsible for it, Human Resources Vice President Albenze identified that "someone" by staring at Davis, and Manager of Employee Relations

Penpek, at the direction of Albenze, stood behind Davis during the meeting. Additionally, the Respondent's animus is reflected by Supervisor Jones' comment on March 12 that he had stopped the union campaign by getting rid of the employee who was responsible for it.

We also agree with the judge that the Respondent's asserted reason for discharging Davis was pretextual and that the Respondent has failed to show that it would have discharged Davis absent his union activities.² In this regard, we note that the Respondent decided to terminate Davis prior to his disciplinary hearing and informed him of its decision after eliciting his admission of sleeping and having him sign a warning notice. The Respondent's shifting reasons for the discharge further support the finding of unlawful motivation. In this regard, we note that the Respondent asserts that Davis was also discharged for obscene language, although his comment was made after the Respondent had determined that he was to be discharged and after so informing him. In addition, the Respondent wrote a memorandum subsequent to the discharge in which it belatedly asserted that Davis had engaged in other misconduct for which he had not been previously disciplined. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(3) by discharging Davis in retaliation for his union activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Scientific Ecology Group, Inc., Kingston, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

² In view of the finding that the Respondent's asserted reasons for the discharge were pretextual, we consider it unnecessary to pass on the judge's discussion of the relative severity of the decision to discharge.

Gaye Nell Hymon, Esq., for the General Counsel.

Louis J. Carr, Jr., Esq. (Assistant General Counsel, Westinghouse Electric Corp.), of Pittsburgh, Pennsylvania, for the Respondent.

Hugh A. Jacks, International Representative, of Chattanooga, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a discharge case. Finding that SEG unlawfully discharged Donnie R. Davis on March 7, 1994, because of his support of the Union, I order the Company to reinstate Davis and to make him whole, with interest.

I presided at this 1-day trial in Kingston, Tennessee, on June 2, 1994, pursuant to the April 26, 1994 complaint and

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

notice of hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 10. (All dates are for 1994 unless otherwise indicated.) The complaint is based on a charge filed on March 11 by Oil, Chemical, and Atomic Workers International Union (the Union or the Charging Party) against Scientific Ecology Group (SEG, Company, or Respondent).

In the Government's complaint the General Counsel alleges that SEG violated Section 8(a)(3) and (1) of the Act when it fired Donnie R. Davis on March 7. Admitting the discharge (and affirmatively asserting that Davis was fired for sleeping on the job and for abusive or threatening language), the Company denies violating the Act. The pleadings establish that the Board has both statutory and discretionary jurisdiction over SEG, and that the Union is a statutory labor organization.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel (who attached a proposed order and proposed notice to the Government's brief) and Respondent SEG, I make these

FINDINGS OF FACT

I. BACKGROUND

A Tennessee corporation, SEG has an office and place of business at Kingston, Tennessee, where it provides waste management services for the United States Government and industrial clients. Because of Kingston's proximity to Oak Ridge, Tennessee, witnesses sometimes refer to the plant as being in the Oak Ridge area. Founded in 1985, SEG was organized to focus specifically on problems associated with the management of commercially generated low-level radioactive waste. (GCX 7 at iii.) This basically involves burning or compacting the radioactive waste so that the volume is reduced for burial. (1:187.)¹ In February 1989 SEG became a wholly owned subsidiary of Westinghouse Electric Corporation. (GCX 7 at iii.) SEG employs over 1000 employees nationwide, with over 700 of them being in the Oak Ridge area. (1:277.)

We principally are concerned here with the Company's metal melt department. Radioactive metal is burned, or melted, there in a furnace where the temperature reaches 2800 degrees Fahrenheit. Employees working near the furnace are in a contaminated area, and they wear respirators and heavy clothing to protect them from the contamination and the extreme heat. The contaminated area is commonly referred to as the "zone." Employees are allowed to rest as needed, and such rest stops are in addition to scheduled breaks in which they leave the contaminated area so that, for example, they can get a drink of water. As of the hearing, some 128 employees worked in the metal melt department on 4 rotating crews of 12-hour shifts which operate the department around the clock 7 days a week.

Although the complaint does not list anyone as being a supervisor and, or separately, agent of SEG, the evidence shows that Pat Walsh is manager of the metal melt facility.

¹ References to the one-volume transcript of testimony are by volume and page. Exhibits are designated as GCX for the General Counsel's and RX for those of Respondent SEG. The Union offered no exhibits.

It is unclear whether Walsh is the plant manager over the 700 employees or whether the metal melt facility is only one part of the Kingston plant. Because Walsh is sometimes referred to as the plant manager, I shall so refer to him in this decision. Douglas Baker Jamieson is the production manager for the metal melt facility. He is responsible for the 128 employees there, and he has 6 supervisors reporting directly to him. Jamieson reports to Pat Walsh. Carl E. "Eddie" Jones is one of the six supervisors reporting to Jamieson, and was such at the relevant time. The parties stipulated that Jones was a statutory supervisor at all material times. (1:46.) Assisting Jones as a leadperson was Kenneth H. Self Jr. who, although a supervisor now, was a level 10 metal melt specialist, or "zone specialist," at the time of the events here.

When asked why the complaint does not name such management persons, the General Counsel explained that it is the Region's policy not to name anyone who is not alleged to have violated the Act. If evidence is objected to, the General Counsel explained, then the matter is addressed by stipulation (such as with Eddie Jones), amendment, continuance, or whatever. (1:45-46.) Despite the Region's policy, the preferred practice is to name those who participated in events, especially if the Government may desire to attribute their knowledge or conduct to the respondent, even if the General Counsel does not allege a violation as to them. Listing them as supervisors or agents serves to clarify the record and avoid the surprise which, when a respondent objects, may cause a continuance (at the parties' inconvenience and the taxpayers' expense) or loss of evidence if no continuance is granted.

Hired June 4, 1993, as a level 5 metal melt technician, Donnie R. Davis received a certificate (GCX 5) in November 1993 commending him for his dedicated work on a project, and in December he was promoted to level 7. Davis testified (1:92) that the promotion actually was due in September. Davis worked on the crew of Supervisor Eddie Jones. At the relevant time they constituted the "D" crew which then was comprised of some 20 employees working the 7 p.m. to 7 a.m. shift. Davis was fired March 7 (March 8, according to SEG).

II. COMPANY KNOWLEDGE OF AND OPPOSITION TO UNION ACTIVITIES

Company knowledge of Davis' union activities is well established. Production Manager Jamieson admits that, before Davis was fired, he had learned hourly employees had reported that Davis was active for the Union. According to Jamieson, such knowledge had no influence on his decision to fire Davis. (1:214-215.) Joseph J. Albenze, vice president of human resources and administration, concedes that he had heard such a rumor about Davis, but asserts that the information had no influence on his decision that Davis be discharged, and claims that, in fact, the rumor had gone "in one ear and out the other." (1:281-282.) Despite this supposed air of disinterest about union activities, SEG's stated policy in its employees' handbook (revised December 1993) opens with unequivocal opposition to unions under the heading, "Union Free Workplace" (GCX 7 at 5):

SEG is a union free facility. SEG does not want, nor do we think you would benefit from a union at this facility.

And notwithstanding Albenze's professed lack of interest ("I could care less") about rumors that Davis was involved with union organizing (1:281-282), the uncontradicted evidence shows that on Friday, March 4, Plant Manager Walsh addressed the "D" crew, or shift, of some 20 employees in the breakroom. In a prepared speech, Walsh said he was disappointed that there was union organizing, that the organizing was not just a rumor. In fact, Walsh stated, the organizing was by "someone in this room." (1:26.) When Albenze entered the breakroom with Walsh, he pointed his assistant, Manager of Employee Relations Rick Penpek, to stand behind Davis. Throughout Walsh's speech (the meeting lasted about 10 minutes, with Albenze also speaking) Albenze, who remained at the front of the room, standing to the right of Walsh, stared at Davis. (Albenze denies "intentionally" staring at Davis. 1:287.) Albenze describes the breakroom as being smaller than the hearing room and that Davis was toward the back of the room, apparently some 30 feet or so away. Rather than varying his gaze across the group, Albenze, I find, stared at Davis, thereby giving name to the "someone" in the room who was responsible for the union organizing and the need for Walsh's speech.

The union organizing began about mid-January when Davis contacted Union Representative Hugh Jacks. Four or five union meetings followed, and Davis persuaded eight or nine of his fellow employees to serve with him on an organizing committee. Davis testified that the group was still in an organizing mode when he was fired on March 7. Although the organizing never went public with the open wearing of union insignia, handbilling, or such, rumors of the organizing surfaced. Around mid-February (apparently February 17, as we shall see) Davis had a 10-minute conversation with Plant Manager Pat Walsh, at a picnic table in the break area, in which Davis told Walsh that he was unhappy at not having been promoted to level 8 as the rest of his co-workers. Previously, Davis had gone to Production Manager Jamieson and then, instead of to Walsh, to Vice President Albenze. Davis' efforts proved unsuccessful.

In the February 17 conversation at the picnic table, Walsh, showing some pique at Davis' failure to come to him, told Davis, "Joe is not going to be able to help you because I am the boss of the Metal Melt. There is nothing that Joe can do that I cannot do. You should have talked to me." As they ended their conversation, Walsh, "out of the clear blue sky," told Davis, "If you feel like a union can do a better job than I can, then you're crazy." Startled, Davis then realized that rumors had reached Walsh.

Later that same day (February 17) Davis met with Jamieson and Walsh, in the latter's office, concerning Davis' request for promotion to level 8. For the first time Davis heard that they considered him to be an angry person with a bad temper. Walsh told Davis that he thought Davis, deep down, was an angry person, that it would be too dangerous to promote Davis to a lead technician position, and that Davis therefore was not qualified. (A level 8 appears to be a first-step leadperson, with level 10 apparently being a senior leadperson, the next step being supervisor.) Jamieson dates this meeting as occurring on February 17 because that is the date which he assigned to it in a memo (GCX 8) to Vice President Albenze which Jamieson prepared on March 15—over a week after Davis had been fired. (I cover the alleged tantrum incidents below.)

About the next day (Friday, February 18), again at the picnic table in the break area, coworker Eddie King asked Davis about unions, strikes, and his fear of being fired for supporting a union. Davis described his understanding of organizing, the right to strike, and the right not to be fired for organizing or striking. Supervisor Eddie Jones, seated with them, expressed his opinion that a union was not in a position to help the employees or protect their best interests. Jones said there were plenty of people dying to make the money they (at the table) were earning. Expressing doubt that anyone would be willing to die for a job paying \$8 an hour, Davis said he thought that "with the union we could have better wages, better benefits, and have a stronger voice in our work place." The next incident was the March 4 speech by Plant Manager Walsh, during which Vice President Albenze stared at Davis.

Before turning to the discharge events, I shall mention a postdischarge incident which, because its relevance bears more on possible motivation than on company knowledge, will be of interest as the discharge events are described. It has to do with a tape-recorded telephone conversation. Davis and Supervisor Jones lived two doors apart in the same apartment complex. At times Supervisor Jones apparently spoke from a cordless telephone in his apartment. After he was fired, Davis obtained a police scanner. With his police scanner, Davis could hear, clearly, the conversations which Jones made on his cordless telephone. Davis tape recorded one such conversation which Jones had with a friend on March 12. The friend worked for a different company, and the conversation turned to unions. Jones said he had just stopped that at his company. (This is followed by a brag by Jones that he now is known at the upper division of Westinghouse. In the process of playing, reversing, and playing as he transcribed the tape, Davis erased that brag. Although it appears on the transcript (GCX 4), the brag is not on the tape. (GCX 3.) While I credit Davis that the brag was on the tape originally, it is clear that the more important statement follows the erased brag.)

After the brag by Jones, the friend sums up by stating that Jones had gotten rid of the Union. To this Jones responds (GCX 4): "Well I got rid of the one that was organizing it." SEG argues that this is mere puffery by Jones. I find that, when viewed with the other evidence, it reflects that SEG devised a plan to fire Davis because of his union activities.

III. DONNIE R. DAVIS FIRED MARCH 7, 1994

A. Facts

1. Davis falls asleep on the job

Under SEG's rules (rule A-8), sleeping on the job is considered serious misconduct which "may result in immediate termination of employment." (GCX 7 at 13.) Nevertheless, the record shows that, at least at the supervisor's level, in the past SEG tolerated sleeping to a substantial extent. The record also shows, however, that the Company's leadpersons were unhappy with the lack of discipline and felt that management would not back them if they tried to enforce the rules. There is no dispute that about late February this changed, although it cannot be said that the parties agree on what prompted the change.

According to Production Manager Jamieson, he and Plant Manager Walsh were in the "zone" about mid to late January (by coincidence, presumably, very soon after the Union began its initial meetings with employees) and discovered what appeared to be beds. (1:235, 237.) Concluding that some sleeping was occurring, they decided to hold some leadership meetings with the supervisors and leadpersons to determine why such matters were not being reported. (1:221.) The first of these meetings was held on February 9. At these meetings the leadpersons expressed a need for management's support, and Walsh and Jamieson assured them they would be supported. (1:233.)

Jamieson testified that the first complaints by the leadpersons were expressed at the first of these meetings, February 9. At one of the first meetings one of the complaints by the leadpersons pertained to Davis. Two past incidents were described. No dates for the incidents appear in the record, and Jamieson did not know whether the incidents occurred in 1993 or 1994. He testified that the incidents are the ones described in his March 15 memo (GCX 8) to Albenze. (1:221-223.) According to Jamieson, when he and Walsh met with Davis on February 17, it was to investigate the reports of his misconduct. (1:224.) The nature of the memo, especially its second paragraph, suggests that the purpose of the meeting was, as Davis testified, in relation to his request to be promoted to a level 8, and that the examples of misconduct were cited to Davis as the basis for SEG's refusal to grant his request for a promotion to level 8.

Addressed to Albenze (with copies to Walsh and Penpek) regarding the February 17 discussion with Davis "concerning actions in Zone," Jamieson's memo (which must be weighed with the fact it was not written until after Davis was fired) describes two incidents. The first was when Davis became upset at being asked to sweep an area. Davis broke the broom and threw the pieces. Jamieson testified that one of the pieces hit another employee in the chest. (1:220.) In the second incident, Davis threw a 5-pound sledge hammer, with the hammer hitting the wall on the opposite side of the furnace room area. According to Jamieson, this happened in the presence of several customers and management persons. (1:220.)

Davis testified that it was not a sledge hammer, but a mallet, and that it was common for employees to throw the mallet into the toolbox on the furnace deck. Davis concedes breaking and throwing the broom, but denies that he threw it at anyone. These are the positions he expressed on February 17 to Walsh and Jamieson. (1:89-91, 114-116.) Davis was not disciplined or even counseled for either incident at the time even though, according to Jamieson, the 5-pound sledge was thrown in the presence of both customers and management. Inconsistently, Jamieson also testified that it was not until the February 9 leadership meeting that management heard about either incident. I find that management was aware of the mallet-throwing incident before Davis' union activities became known, that the mallet incident was a common action by employees, and that such was the reason nothing was said about it to Davis at the time. As for the broken broom, I find that SEG learned about it on February 9 but said nothing to Davis until February 17, after learning of his union activities.

Returning now to the leadership meetings, I note that following the first few of those meetings, the supervisors then

met with their crews to state that henceforth SEG's handbook rules would be enforced. Jamieson dates the crew meetings as occurring February 24 to March 5. (1:234.) Matthew Freshour, a level 8 metal melt specialist on the crew of Supervisor Eddie Jones (1:150-151, 161), and a witness called by the Government, testified that about a week before Davis was fired Jones told his crew that henceforth SEG's conduct standards would be enforced, that such conduct as horseplay and sleeping on the job would no longer be tolerated, and that any violations would be punished as provided in SEG's employees' handbook. (1:161-162.) Although Davis does not recall this (1:93-94), I credit Freshour.

James Shaffer, who also attended the leadership meetings as a level 8 member of the crew of Supervisor Jones, testified that management discussed what would constitute sleeping. On the late night shift, nodding off while sitting on a resting position (such as on a bucket) was different from making a pallet, lying down, and going to sleep. The latter would be punished, while the implication was that a mere nodding, while sitting, would not be treated as sleeping on the job. At the same time, no permission was given for employees to doze. (1:142-144.)

That brings us to the night shift (7 p.m. to 7 a.m.) beginning Sunday, March 6. There is no dispute that Davis fell asleep around 3 a.m. the following morning, Monday, March 7. Davis estimates the sleep time as about 10 minutes. Kenneth H. Self, then the level 10 leadperson, estimates the time as 20 to 30 minutes. Davis testified that he and level 8 leadperson Robert Wright and Eddie King sat down to rest after charging the furnace. They would have to wait 30 minutes to an hour for the steel to melt. Level 10 leadperson Self was somewhere else. The three sat down in the area by the door to the furnace room, with Davis having his back against a partial wall, his right elbow on the bottom step leading down to the furnace area, and his legs stretched out cater-cornered. Neither party called Robert Wright or Eddie King as a witness. Kenneth Self testified that Davis was the only one who lay down and that the others were "walking around the deck doing various things. We weren't stationary in one position." I do not believe Self to the extent he seeks to describe what happened at first. As a witness, Self testified with an unpersuasive demeanor. After Davis fell asleep, and the others left, some of what Self described may have occurred. In short, I credit the version given by Davis. It was late (3 to 3:15 a.m.) and hot. The employees began dozing. Davis went to sleep. Whether he slept 10 minutes or 20 minutes is immaterial, for Supervisor Eddie Jones, alerted by Self, came and observed that Davis was sleeping in a stretched out position.

Eventually Davis awoke and went outside the zone to the break area where, finding Wright and King at a table there, he joined them. Both told him, "They have got you." When Davis asked what they meant, King said that after Davis had dozed off, Kenneth Self came and told Wright they should go for a break (meaning to the break area outside the contaminated zone). When King started to awaken Davis, Self grabbed him and said, "No, leave his ass there. We are going to get him." Wright confirmed this. (1:29-30, 78-79.) No objection was raised against this hearsay, and I address the hearsay matter later. When Self testified he admitted that, despite his position as leadperson responsible for leading, training, and directing the employees, he did not awaken

Davis (even though he asserts that he saw Davis when Davis first lay down) because he wanted Supervisor Jones to observe Davis, “to eliminate any confusion or conflict.” Asked why, when he observed Davis asleep, he did not awaken him, he testified that it was almost breaktime and “It just didn’t occur to me.” (1:245–246.) It is clear that Self did not awaken Davis because he wanted Supervisor Jones to come observe Davis sleeping. As for it not occurring to Self to awaken Davis, that, too, probably is true—because the plan, as quoted to Davis by King and Wright, was to “get” Davis. Self never denies making the remark.

In short, I find the evidence establishes Self’s status as a statutory agent on this occasion. As no objection was made to questions about Self’s duties, the matter of agency was litigated by implied consent under Rule 15(b), Federal Rules of Civil Procedure.² Because Self’s own testimony about his purpose in not awakening Davis lends solid support to the unobjected-to hearsay report of King and Wright, I credit that hearsay report and attach weight to it. Thus, I find that leadperson Self, as SEG’s statutory agent, told Eddie King not to awaken Davis because “We are going to get him.” The “we,” I find, was management. The next question is why was management going to “get” Davis. Was it to make an example out of someone who was sleeping on the job? There is no evidence indicating such a meaning. The most reasonable interpretation under the evidence is that management was going to retaliate against Davis because of his union activities whenever an opportunity arose to do so. Davis presented this opportunity when he went to sleep, and his sleep would serve as a golden pretext to mask the real motive. I so find.

2. The discharge interview

Between 7 and 7:30 a.m. that same day, March 7, Donnie Davis and Matthew Freshour were called to the office of Production Manager Jamieson. (There is disagreement on who called them, or escorted them. Generally, I credit the version of Davis.) Freshour (level 8) was called in because Robert Wright (level 8 leadperson) had accused him of sleeping that same night. (The accusation came after the event, and Supervisor Jones had no opportunity to observe.) Present in the office were Jamieson, Davis, and Freshour. Contrary to the recollection of Davis, it appears that Supervisor Jones was present during the time Davis was there.

Jamieson began by handing Davis a warning slip. He said he was disappointed that Davis and Freshour had been caught sleeping. (As we see in a moment, Davis tore up the original. Management wrote out a second one, an alleged duplicate, which is in evidence as GCX 2.) As Davis describes, and I credit, the original slip (completed as described by Jones rather than as described by Jamieson) had the block for first warning checked, as well as the block marked for written warning. The “Employer Statement” had a single word—“Sleeping.” Davis asked if he was getting a written

warning, and Jamieson said yes, that it was a very serious matter. Embarrassed that he had fallen asleep, but thinking that, with his good work record, he could overcome this in 6 months, Davis signed the warning form. At that Jamieson asked, “So you admit to sleeping?” Davis said yes, he had signed the form. Jamieson then said that Vice President Albenze had recommended that Davis be indefinitely suspended. Davis asked what that meant, whether it meant he was fired. (Jamieson does not recall this question, 1:200, but Jones does, 1:255–256.) “Yes,” said Jamieson. Jamieson denies (1:200) and Jones asserts (1:255–256) that Jamieson replied no, that he was indefinitely suspended until a review by human resources.

Jamieson’s own version (1:190) is more consistent with Davis’, for he states he asked Davis to sign the “suspension” (an unlikely word given the context) notice, and when Davis signed, Jamieson said that, as Davis had verified that he had been sleeping on the job, there would be an indefinite suspension pending an investigation.

When Jamieson confirmed that Davis was being fired, Davis, provoked by the turn of events, took the warning off the desk, tore it up (apparently putting the pieces in his pocket; the record does not show what happened to the pieces) and, turning and leaving, stated, “Stick it up your ass.” (Davis reports a milder response, Jamieson asserts that Davis used more obscene language, Jones gives the quote plus the more obscene language, and Freshour gives strictly the quote that, I find, was the remark by Davis.)

Although the duplicate slip (GCX 2) states that Davis was being indefinitely suspended, with Jones and Jamieson signing on March 7, the suspension, in Albenze’s hand and in dark ink, was converted that afternoon to a discharge, “Terminated for ‘Sleeping on the job and abusive language.’” Albenze signed at 3:50 p.m. on “3–7–94.” (GCX 2.) Over the heavy black ink Albenze used, a lighter ink appears to show an “8” over the “7” for the day.

According to the management witnesses called by the Company, Walsh, Jamieson, Albenze, and Penpek met that Monday afternoon and reviewed records of both Davis (who had no prior discipline, but his “past history of temper” was considered) and Freshour. Jamieson (1:202–203) and Albenze (1:280) testified that no decision was made that day. Albenze testified that he said they should think about the matter and get a good night’s sleep. (1:280.)

These management witnesses testified (Walsh did not testify) that the following day, March 8, they again met and decided to discharge Davis. In the presence of Albenze and Penpek, Jamieson then telephoned the news to Davis, and allegedly informed Davis he could appeal either to a “Peer Review” or by the “Open Door” policy. Davis asserts that the call was nothing more than to give him “official” notice that he was fired. I credit the version of Davis. SEG’s own duplicate form (GCX 2) refutes much of the Company’s version.

Freshour’s 3-day suspension on March 7 (GCX 6) was reduced to a “loitering” warning and loss of quarterly bonus (RX 2) after supporting witness Darryl Sirmons came forth on March 8 to say that he had been with Freshour and that neither had been sleeping. (Sirmons received the same discipline, RX 3.) Distinctions drawn by the Company between Freshour’s case and that of Davis are: (1) Supervisor Jones actually observed Davis sleeping, (2) Davis admitted he was

²Early at trial the General Counsel announced that, at that point, she did not intend to rely on any conduct by Self unless Self testified and something developed. (1:79–80.) Self testified and, without objection, described his duties. Although the General Counsel does not argue agency, or rely on Self’s remark, SEG is not insulated from findings here because no assurances against such were given as in *Herman Bros.*, 264 NLRB 439, 440 fn. 3 (1982).

sleeping; Freshour denied that he was sleeping, and (3) Davis used abusive language on March 7 whereas Freshour was remorseful.

In late March Freshour, returning the March 7 favor to Robert Wright, reported that Wright was sleeping on the job. Wright, however, was sitting, and when approached, raised his head. He was given the same discipline imposed on Freshour on March 8.

B. Discussion

Without question, a moving reason for SEG's discharge of Donnie R. Davis was his spearheading the Union's nascent organizing campaign. Knowledge is shown. Animus is reflected in Plant Manager Walsh's February 17 remark to Davis that he was crazy if he thought the Union could do a better job (of helping employees) than could Walsh. The context of Walsh's statement shows that Walsh was doing more than innocently expressing his subjective evaluation of the abilities of himself and the Union. He was conveying a message to Davis. The overt message was: I do not like what you are doing. The implied submessage was: To eliminate the problem you are causing, I will get rid of you. This message was repeated, in effect, at the March 4 crew meeting when Walsh essentially branded "someone" in that very room as a traitor because he was spearheading the union organizing, and Albenze gave name to the "someone" when he stared at Davis during the talk by Walsh while Penpek, as pointed by Albenze, stood directly behind Davis. That the animus had ripened by March 7 into a plan of retaliation is demonstrated by leadperson and statutory agent Kenneth Self's 3:20 a.m. (or so) revelation of management's plan (as I have found) to "get" Davis. That the plan of retaliation stretched straight down the command chain from plant manager to supervisor to leadperson is shown by the March 12 tape-telephone remark of Supervisor Jones that he had gotten rid of the person organizing the Union.³

Pretext generally is shown by disparity of treatment or by advancing a false reason. Here, pretext is shown by the plan itself. Disparity is not shown here because the past history of SEG's tolerating (at least at the supervisor's level) sleeping on the night shift ended a week or so before Davis was fired, and contemporary events (Freshour on March 7; Robert Wright in late March) are substantially different from Davis' admission of sleeping. I also draw no adverse inference from the fact Production Manager Jamieson obtained the sleeping admission from Davis before informing him of the indefinite suspension. First, the General Counsel introduced no evidence that such a tactic was a departure from past practice. Second, regardless of whether the tactic may be characterized as trickery, obtaining the admission and signature also can be viewed as a prudent desire to establish the fact before announcing any decision.

The General Counsel having established, *prima facie*, that a moving reason for the Company's discharge of Davis was his union activities, the burden shifted to SEG to establish, as an affirmative defense, that it would have fired Davis even absent any union activities. The question is, did SEG carry its burden. Bearing on this question is the timing of Respondent's decision. The facts, as I have found, show that

SEG had decided, even before Jamieson's March 7 meeting with Davis and Freshour, to fire Davis. Perhaps unwittingly, Jamieson disclosed this on March 7 when Davis asked if the indefinite suspension meant that he was fired, and Jamieson answered yes. Thus, the decision to discharge was reached based only on the sleeping, and was reached before the intemperate reaction by Davis at the news of his discharge. Davis' intemperate remark simply provided SEG with another ground to add to the decision already reached. SEG failed to show that it would have fired Davis for the sleeping incident absent any union activities. Jamieson admits that discharge for a group A violation, as sleeping on the job is classified, is not automatic, and Davis had received a previous commendation and no prior discipline. Discharge in such a situation appears to be overkill. Although the Government has no authority to regulate lawful personnel actions, overkill or not, the appearance of excessiveness in discipline lends support to evidence already demonstrating an unlawful discipline. Had SEG contented itself with imposing nothing more than the written warning initially indicated, or the 3-day suspension initially assigned to Matthew Freshour, even Davis, as he testified (1:98), would not have protested.

The next question is whether Davis' intemperate outburst bars him from reinstatement. (In this connection, only his language is involved, not the tearing up of the warning document. While deliberate destruction of company property is a group A violation, rule 4, SEG never listed or advanced that rule as a basis for any discipline against Davis. SEG may not now benefit from the rule.) Although general profanity among the mostly male work force is common at SEG, cursing a situation is far different from cursing a person, or directly telling management to "Stick it up your ass." Although the General Counsel argues that Davis was provoked by the unlawful discharge, Davis testified only that he was frustrated at the situation. (1:103.) He never expressly linked his frustration to perceived discrimination because of his union activities. Still, his one vulgar, insubordinate remark falls far short of conduct so indefensible as to forfeit the right to reinstatement. The cases make clear that an unlawfully discharged employee is given some leeway for impulsive behavior. Unlike the killing threat found indefensible in *Precision Window Mfg. v. NLRB*, 963 F.2d 1105 (8th Cir. 1992) (denying enf. of 303 NLRB 946 (1991)), here there was no threat of violence, much less a threat to kill. In short, Davis' intemperate language, as he was heading out the door, was far too mild to cause forfeiture of his right to reinstatement. I so find.

CONCLUSIONS OF LAW

1. The General Counsel established, *prima facie*, that the union activities of Donnie R. Davis were a moving reason for Respondent SEG's March 7, 1994 discharge of Davis in violation of 29 U.S.C. § 158(a)(3) and (1).

2. Respondent SEG failed to carry its burden of persuasion, as an affirmative defense, that it would have fired Davis even in the absence of any union activities.

3. The intemperate remark by Davis following notice of his discharge was far too mild, in light of the unlawful nature of the discipline imposed, to cause Davis to forfeit his right to reinstatement.

4. The unfair labor practice found affects commerce within the meaning of 29 U.S.C. § 152(6) and (7).

³ "They devise a wicked scheme, and conceal the scheme they have devised." Ps. 64:7.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Scientific Ecology Group, Inc., Kingston, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Discharging or otherwise discriminating against any employee for supporting Oil, Chemical, and Atomic Workers International Union, AFL-CIO or any other union.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Offer Donnie R. Davis immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

- (b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

- (c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

- (d) Post at its facility in Kingston, Tennessee, copies of the attached notice marked "Appendix."⁵ Copies of the no-

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the

tice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Oil, Chemical, and Atomic Workers International Union, AFL-CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Donnie R. Davis immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Donnie R. Davis that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

SCIENTIFIC ECOLOGY GROUP, INC.